SUPREME COURT, U.S.
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No. 94-334

In The

Supreme Court of the United States

October Term, 1994

CHRISTINE WILLIAMS and CITIZENS FOR LIFE,

Petitioners,

vs.

PLANNED PARENTHOOD SHASTA-DIABLO, INC.,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of California

RESPONDENT'S BRIEF IN OPPOSITION

GEOFFREY L. ROBINSON
Counsel of Record
MARIA P. RIVERA
McCUTCHEN, DOYLE, BROWN & ENERSEN
Attorneys for Respondent
1331 North California Blvd.
P.O. Box V
Walnut Creek, California 94596
(510) 937-8000

5748
Lutz Appellate Services, inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

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QUESTION PRESENTED

Whether the decision of the California Supreme Court in this case conforms to the standard announced in *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516 (1994).

PARTIES TO THE PROCEEDINGS

Respondent Planned Parenthood Shasta-Diablo, Inc., is a California non-profit corporation. It has no parent company or subsidiaries. No other corporations are parties to this action. This statement is submitted pursuant to Rule 29.1.

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Respondent Planned Parenthood Shasta-Diablo, Inc., ("Planned Parenthood") respectfully submits this opposition to the petition for writ of certiorari to the Supreme Court of the State of California.

SUMMARY OF ARGUMENT

Petitioners ask this Court to review, summarily reverse, or vacate and remand the decision of the California Supreme Court upholding a place restriction on protest activities outside a medical clinic. The reasons cited by petitioners are: (1) The decision is in "plain conflict" with *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516 (1994); and (2) the California Supreme Court held that anti-abortion speech can be restricted *solely* because of the emotional trauma it causes. Neither of these reasons is supported in the petition.

Petitioners try to manufacture a conflict by equating the place restriction in this case with the 300-foot no-approach zone in *Madsen*. But the place restriction in this case is functionally equivalent not to the 300-foot zone that was struck but to the 36-foot zone that was upheld in *Madsen*. Nor can petitioners show that the California Supreme Court upheld the injunction solely to prevent "emotional trauma." The decision is premised not on an abstract concern about avoiding emotional trauma, but on the significant governmental interest in the health and safety of patients about to undergo surgery and other medical procedures.

To buttress these arguments, petitioners characterize the decision as "nothing less than a rationale for excluding *all* [anti-abortion] speech from *all* public sidewalks or property adjacent to abortion [clinics]." This is hyperbole. The decision creates no blanket rule governing injunctions against protesters outside of medical clinics, any more than did the decision in *Madsen* upholding the 36-foot buffer zone. On the contrary, the California Supreme Court carefully considered the specific conduct at issue,

analyzed the physical layout of the area, and upheld the place restriction as necessary *in this case* to protect the health and safety of clinic patients. The court acknowledged that the "nature and extent of injunctions in these cases differ, naturally, depending on the particular facts and geographic circumstances presented." (App. 19a). Nothing in the decision suggests that in a case with distinct facts — with a different geographic layout or involving conduct by the protesters that implicated different governmental interests — the same injunction would be appropriate.

Petitioners have provided no valid reasons to support review, summary reversal or remand of the decision. No purpose would be served in having the California Supreme Court repeat its analysis under the new standard adopted in *Madsen*. This case presents no basis for issuance of a writ of certiorari, and the petition should therefore be denied.

RESPONSE TO STATEMENT OF THE CASE

A. Factual Background

Planned Parenthood is a non-profit corporation operating a family planning clinic in Vallejo, California. (App. 2a). The clinic provides a full range of family planning, health and counseling services, including medical exams, laboratory testing and abortions. (App. 2a).

The clinic is in a single-story office building that Planned Parenthood shares with a tax service. (App. 2a). A parking lot adjoins the clinic on one side and to the rear of the building; the lot is for the exclusive use of Planned Parenthood and the tax service. (App. 2a, 45a). There is a short, narrow sidewalk in front of the office building, punctuated by driveway entrances. (App. 2a).

In March 1990, petitioners[1] started to gather at the clinic, primarily on Thursdays when abortions were performed, and began a pattern of harassment and intimidation of Planned Parenthood's patients and staff. (App. 2a-3a, 45a). The number of protesters varied from a handful to over 100. (App. 2a-3a, 45a). Petitioners frequently brought children, ranging in age from infants to teens, to the demonstrations. (App. 3a). Small children would run up and down the sidewalk next to the street. (App. 45a).

Petitioners picketed throughout the parking areas, driveways and sidewalk in front of the office building, carrying signs protesting abortion. (App. 3a, 45a). They obstructed cars entering the driveway into the clinic's parking lot. (App. 3a, 45a). As cars attempted to turn into the clinic driveway, petitioners would surround them and try to pass literature through the windows before they could be rolled up. (App. 3a). They followed patients to and from their cars or to the bus stop, attempting to hand them literature and replicas of plastic fetuses. (App. 45a). They also accosted, surrounded or followed patients on the sidewalk. (App. 16a). Petitioners also stationed "counselors" in the parking area who pressed literature and plastic fetuses on those entering the clinic. (App. 3a). On one occasion, they handed a plastic fetus to a small child after his mother had refused to take it herself. (App. 16a). They often stood directly in front of the doorway to the clinic, making it difficult to enter or exit. (App. 45a).

Petitioners' activities caused some of the patients seeking medical care or counseling at the clinic to become emotionally distraught. (App. 3a, 16a, 45a-46a). Planned Parenthood was forced to escort patients to ensure their unimpeded passage to the door of the clinic. (App. 3a, 45a). On at least one occasion, staff members had to disperse a group of picketers who were surrounding a patient on the sidewalk. (App. 3a, 16a).

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1. Petitioners are Christine Williams and Citizens for Life, an unincorporated association.

B. The Trial Court Decision

In August 1990, the trial court issued a temporary restraining order prohibiting petitioners from blocking or harassing any person coming into or out of the clinic and restricting their picketing to the sidewalk in front of the clinic. (App. 67a-69a). After a hearing, the trial court issued a preliminary injunction that restricted the number of picketers on the sidewalk to a maximum of four and required that at least two of these picketers remain ten feet apart from the other two. (App. 70a-71a).

At trial on the permanent injunction, testimony was introduced concerning petitioners' harassment and intimidation of patients and staff at the clinic. (App. 48a-49a). There was also testimony that police enforcement was necessary because picketers on the sidewalk had violated the terms of the preliminary injunction. (App. 4a, n.2).

Following trial, the court made findings, based on the uncontradicted evidence, that petitioners (1) confronted and intimidated women seeking Planned Parenthood's services; (2) interfered with or obstructed entrance to and from the clinic; (3) pursued patients to their cars or public transportation in an effort to distribute literature or plastic fetuses; (4) conducted these activities on a weekly basis, with as many as 100 people involved; and (5) caused some of the women seeking counseling or services from Planned Parenthood to become emotionally distraught. (App. 45a-46a).

In August 1991, the trial court entered judgment for Planned Parenthood, issuing a permanent injunction restricting petitioners' picketing activities to the sidewalk immediately across the street from the clinic. (*Id.*).

C. The California Supreme Court Decision

The California Supreme Court upheld the exclusion of petitioners from the sidewalk directly in front of the clinic. Conducting an independent review of the record pursuant to *Bose v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 489-511 (1984), the court concluded that the trial court's findings should not be disturbed "under any standard." (App. 2a, n.1). It held that those findings supported the sidewalk restriction as necessary to protect the health and safety of clinic patients. (App. 16a-17a).

The court reasoned that the state's responsibility for health and safety of patients seeking medical services extended well beyond the operating room. (App. 14a). Physical and emotional intimidation of patients outside the clinic, the court found, could significantly affect their course of treatment once inside by, for example, leading to inaccurate blood pressure readings, delaying or complicating treatment, and prolonging recovery. (App. 14a-16a). It pointed out that the findings of fact adopted by the trial court revealed that "it was precisely the health and well-being of the clinic's patients that constituted the court's primary concern." (App. 15a).

The court further concluded that, based on a demonstrated record of repeated harassment and intimidation, the sidewalk restriction was narrowly tailored to protect the health-and-safety interest "under the particular facts and geographic circumstances presented." (App. 19a). It reasoned that merely keeping the sidewalk clear for passage did not "address the problem identified by the trial court of protesters hounding and upsetting unwilling listeners."[2] (App. 20a). Nor, the court found, would limiting the

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2. Petitioners take issue with the characterization of their actions as "confronting" and "intimidating" patients and "forcing" literature and counseling on them. (Petition at 8-9). However, these descriptions are based on the trial court's first-hand observation of the witnesses and the physical

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number of picketers on the narrow sidewalk in front of the clinic necessarily mitigate the emotional impact on patients "forced to navigate even a limited number of pickets and sidewalk 'counselors.' " (*Id.*). It found that under "these unique circumstances, the trial court was eminently justified in concluding that the protesters' proven confrontational tactics posed an intolerable threat to the emotional health and safety of the patients, whether those tactics were resorted to by two or twenty." (App. 21a). Limiting the protestors' activities to the alternative site across the street, the court reasoned, allowed them a vantage point from which to picket and demonstrate that was reasonably close to the clinic and within plain view of their target audience. (App. 23a). The place restriction, the court concluded, therefore struck the appropriate balance between protecting the health and safety of clinic patients and allowing petitioners a reasonable forum for their protest activities. (App. 21a-23a).

(Cont'd)

evidence. Additionally, the California Supreme Court conducted an independent review of the record and found these characterizations to be fully justified. (App. 2a, n.21; 20a-20b, n.20). While petitioners may quarrel with these descriptions, this cannot provide a basis for review, as this Court made plain in *Milkwagon Drivers v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 294 (1941). There, a special master found that petitioners' picketing activities had resulted in intimidation of respondent's customers, and the Illinois Supreme Court upheld restrictions on the picketing based, in part, on such intimidation. On review, this Court declined "to make an independent valuation of the testimony before the master" to determine whether this characterization was accurate, stating:

> We have not only his findings but his findings authenticated by the State of Illinois speaking through her Supreme Court. We can reject such a determination only if we can say that it is so without warrant as to be a palpable evasion of the constitutional guarantee involved. The place to resolve conflicts in the testimony and its interpretation was in the Illinois courts and not here.

REASONS FOR DENYING THE WRIT

I.

THE DECISION OF THE CALIFORNIA SUPREME COURT IS NOT IN CONFLICT WITH *MADSEN*.

Petitioners' contention that this decision "is in plain conflict with *Madsen*" is based on two premises: first, that the place restriction in this case is "equivalent to" the 300-foot "no-approach" zone struck in *Madsen*; and, second, that because *Madsen* adopted a more stringent standard than that used by the California Supreme Court, this decision is *ipso facto* invalid. Neither premise is valid.

A. The Injunction in This Case Is Not Equivalent to the 300-Foot Zone in *Madsen*.

The place restriction in this case is the functional equivalent not of the 300-foot zone that was struck, but of the *36-foot zone* in front of the clinic that was upheld in *Madsen*. That buffer zone, as this Court observed, effectively moved petitioners to the other side of the street (Dixie Way) from the clinic and away from the clinic driveway where the state court found they had repeatedly interfered with the free access of patients and staff. (114 S. Ct. 2526). The injunction in this case accomplished the same result by requiring petitioners to confine their activities to the sidewalk across the street. However, in contrast to the injunction in *Madsen*, petitioners here were not *further* constrained by a 300-foot overlay zone prohibiting uninvited approaches. They were free to conduct their "sidewalk counseling," to distribute literature and plastic fetuses, and to approach or follow people, whether invited or not, provided they did not do so on the narrow sidewalk and driveways adjacent to the clinic.

In short, nothing in this injunction purported to bar uninvited

approaches or to impose a consent requirement on petitioners' speech activities. Hence the concerns expressed by the Court in *Madsen* about the no-approach zone (*see* 114 S. Ct. at 2529) have no application here.

II.

THE CALIFORNIA COURT'S USE OF A LESS STRINGENT STANDARD THAN THE ONE ADOPTED IN *MADSEN* DOES NOT RENDER THE DECISION INVALID.

Petitioners argue that "[r]egardless of whether the decision of the court below was defensible at the time it issued, that decision cannot survive *Madsen's* repudiation of its legal underpinnings." (Petition at 15). This argument focuses on the form of the decision and ignores its substance. In *Madsen*, the Florida Supreme Court, of course, also used the less stringent "time-place-and-manner" standard, but that did not prevent this Court from upholding significant portions of the injunction, including the 36-foot zone most comparable to the place restriction here. *See Operation Rescue v. Women's Health Center, Inc.*, 626 So. 2d 664, 667 (Fla. 1993). The issue is not whether the California Court couched its decision in the rubric of the new standard, but whether the facts of the case justified the relief granted under that standard. They clearly did.

A comparison of the facts of *Madsen* with those of this case reveals obvious and important similarities. In both cases,

- Petitioners picketed and demonstrated in various areas around the clinic, including the public sidewalk and driveways providing access to the clinic (114 S. Ct. at 2527; App. 2a, 45a; 626 So. 2d at 667). The picketing was focused primarily on patients and staff, as opposed to a more generally disseminated from of communication such as handbilling or solicitation.

(114 S. Ct. at 2527; App. 18a, 45a; 626 So. 2d at 672).

- The protesters impeded access to the clinic by, *inter alia*, marching in front of the clinic's driveways. (114 S. Ct. at 2521; App. 3a; 626 So. 2d at 667). As cars slowed to allow the protesters to move out of the way, "sidewalk counselors" approached and attempted to give occupants anti-abortion literature and counseling. (114 S. Ct. at 2521; App. 3a, 45a; 626 So. 2d at 667-68). In this case, the protesters also pursued patients as they walked from their cars to the clinic entrance — as well as along the sidewalk and across the street to the bus stop — offering "sidewalk counseling." (App. 3a, 16a, 45a).

- The number of protesters in *Madsen* varied from a handful to 400. (114 S. Ct. at 2521). In this case, the number ranged from six to over 100. (App. 2a-3a).

- As a result of having to run the gauntlet of protesters in order to enter the clinic, the patients manifested a higher level of anxiety and emotional distress. (114 S. Ct. at 2521; App. 3a, 45a-46a; 626 So. 2d at 668).

- Evidence concerning the protesters' activities following issuance of the original injunctive orders led the trial courts to conclude that these restrictions had been insufficient to accomplish their goals; accordingly the courts broadened the scope of the limitations on the protesters' activities. (114 S. Ct. at 2521, 2527; App. 4a-5a; 626 So. 2d at 667-69).

- In *Madsen*, the trial court expanded its injunction to prohibit, *inter alia*, picketing, patrolling, demonstrating or *entering* the area within 36 feet of the property line of the clinic, which effectively

> limited the protesters' activities to the opposite side of Dixie Way. (114 S. Ct. at 2522; 626 So. 2d at 669). In this case, the trial court broadened the preliminary injunction to restrict all picketing, demonstrating or counseling to the public sidewalk across the street from the clinic. (App. 5a, 46a).

On appeal in these cases, the state supreme courts both cited the governmental interests in protecting the health and safety of clinic patients as justifying imposition of the injunctive orders. (App. 11a; 626 So. 2d at 672, 673, 675). Both reasoned that the type of face-to-face confrontations to which patients were subjected as they attempted to enter the clinic to undergo medical treatment potentially jeopardized their health and safety. (App. 14a-16a; 626 So. 2d at 672, 675). Both also analogized the strong interest in residential privacy recognized in *Frisby v. Schultz*, 487 U.S. 474 (1988), to medical privacy, noting that targeted picketing of a medical clinic threatened not only the psychological but the physical well-being of the patient held "captive" by medical circumstance. (App. 12a, n.6, 11a-16a; 626 So. 2d at 667; *see also* 114 S. Ct. at 2526).

Notwithstanding the similarities between both the facts and decisions in these cases, petitioners argue that the sidewalk restriction in this case "cannot be justified as necessary to preserve access to the facility," and hence *cannot be justified at all* under *Madsen*. This argument is untenable. The Court in *Madsen* held that the interest in protecting "*unfettered* ingress to and egress from the clinic" justified the 36-foot buffer zone. (114 S. Ct. at 2527) (emphasis added). It did not say that such a zone was justified only to avoid a complete blockade of the clinic; nor, indeed, was there evidence in *Madsen* that petitioners had ever blocked access completely.[3] Rather, they were engaging in the same tactics —

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3. The findings of the trial court in *Madsen* clearly reveal that the problem (Cont'd)

slowing vehicles, thrusting literature through windows, and accosting and harassing patients and staff on their way into and out of the clinic — employed in this case.[4]

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was not denial of access but interference with access:

> The interference to ingress has taken the form of persons on the paved portions of Dixie Way, some standing without any obvious relationship to others; some moving about, again without any obvious relationship to others; some holding signs, some not; some approaching, apparently trying to communicate with the occupants of motor vehicles moving on the paved surface; some marching in a circular picket line that traversed the entrance driveways to the two parking lots of the petitioners and the short section of sidewalk joining the two parking lots and then entering the paved portion of the north lane of Dixie Way and returning in the opposite direction. Other persons would be standing, kneeling and sitting on the unpaved shoulders of the public right-of-way. As vehicular traffic approached the area it would, in response to the congestion, slow down. If the destination of such traffic was either of the two parking lots of the petitioners, such traffic slowed even more, sometimes having to momentarily hesitate or stop until persons in the driveway moved out of the way. (626 So. 2d at 667).

4. In *Madsen*, the trial court described these tactics as follows:

> As traffic slowed on Dixie Way and began its turn into the clinic's driveway, the vehicle would be approached by persons designated by the respondents as sidewalk counselors attempting to get the attention of the vehicles' occupants to give them anti-abortion literature and to urge them not to use the clinic's services. Such so-called sidewalk counselors were assisted in accomplishing their approach to the vehicle by the hesitation or momentary stopping caused by the time

(Cont'd)

These activities, the California Supreme Court found, forced clinic patients into emotionally jarring confrontations with pickets and "sidewalk counselors" as they attempted to enter or leave the clinic, creating stress and anxiety that posed potentially significant health risks for those about to undergo surgery or other medical procedures. Thus, while patients may not have been physically barred from entering or leaving, they were forced — as in *Madsen* — to subject themselves to a gauntlet of protest activities, with its attendant emotional trauma and adverse physical effects, as a condition to obtaining access to the clinic. (App. 18a, 626 So. 2d at 672). Those that chose not to subject themselves to these stresses were effectively denied access; those that did, underwent the risk that the emotional trauma engendered by the forced physical encounters would undermine the safety of the medical procedure. Additionally, as the Court in *Madsen* noted, patients who were turned away because of the crowd but chose to return at a later date potentially increased their health risks by reason of the delay. (114 S. Ct. at 2521).

Thus whether the governmental interest is described as "protecting *unfettered* ingress or egress" as in *Madsen* or as "safeguarding the health and safety of the clinic's patients" as in this case, the fundamental principle is the same in both cases, namely ensuring that patients do not have to submit to delay and harassment by protesters as a condition to obtaining access to medical care.

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needed for the picket line to open up before the vehicle could enter the parking lot. (626 So. 2d at 667-68).

In this case, the court observed that "[o]ne of the tactics of the sidewalk picketers was to walk slowly across the driveway entrance, thereby delaying cars attempting to turn into the lot. As the cars drove in, the protesters would approach and surround the car, attempting to pass literature through the windows even as they were being rolled up." (App. 3a).

Moreover, even if the governmental interest described by the California court is not coextensive with the interest identified in *Madsen*, this does not mean that this decision cannot stand, as petitioners contend. While this Court in *Madsen* cited the interest in protecting unfettered access as sufficient to justify the 36-foot buffer zone, it did not say that this was the *only* interest that could support such a restriction. Indeed, the Court clearly acknowledged the validity and importance of the governmental interests in protecting the freedom to seek lawful medical services and counseling and in restricting "targeted picketing of a hospital or clinic [that] threatens not only the psychological, but the physical well-being of the patient held "captive" by medical circumstance." (114 S. Ct. at 2526). The Court found these interests to be among those that were "quite sufficient to justify an appropriately tailored injunction." (*Id.*). It is those interests that the California court relied on here.

III.

THE PLACE RESTRICTION ADVANCED THE SIGNIFICANT GOVERNMENTAL INTEREST IN SAFEGUARDING THE HEALTH AND SAFETY OF PATIENTS SEEKING MEDICAL CARE.

Petitioners contend that the injunction cannot be justified as necessary to prevent "emotional trauma." (Petition at 11). This is disingenuous. It was not "emotional trauma" *per se* that the California court identified as the principal concern; it was the impact of such trauma on the integrity and safety of the medical care and procedures provided at the clinic.

The California court began its analysis with the familiar principle that the reasonableness of content-neutral restrictions on speech depends heavily on the "nature of a place [and] 'the pattern of its normal activities. . . .' The crucial question is whether the manner of expression is basically incompatible with the normal

activity of a particular place at a particular time." *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972). (App. 13a). It concluded that the same principle that sustained the regulation of disruptive expression outside of schools (*Grayned*), courthouses (*Cox v. Louisiana*, 379 U.S. 559 (1965)), and homes (*Frisby v. Schultz*, 387 U.S. 474 (1988)), defined an equally substantial interest in restricting conduct incompatible with the health and safety of patients in a medical facility. (App. at 12a). The court noted that this Court had explicitly recognized the significant interest in protecting hospital patients from disturbance in *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978), and other cases. (App. 12a-13a).

The court reasoned that the state's interest in protecting the health and safety of patients seeking medical care extended beyond the operating room. (App. 14a). It pointed out that physical or emotional intimidation of patients outside of the doctor's office could significantly affect their course of treatment once inside. (*Id.*). Such emotional trauma, the court observed, could result in inaccurate blood pressure readings or incomplete medical histories and could complicate counseling, delay treatment, increase health risks and prolong recovery. (App. 16a).

The findings of fact adopted by the trial court "reveal that it was precisely the health and well-being of the clinic's patients that constituted the court's primary concern." (App. 15a). The trial court found that the petitioners' activities — including confronting and intimidating patients, forcing "counseling" and replicas of plastic fetuses on them, interfering with and obstructing access to and from the clinic, and pursuing patients to their cars or to the bus stop — had caused patients seeking counseling or medical services to become emotionally distraught. (App. 45a, 15a-15b). One of the principal purposes of the trial court's place restriction

> was thus to constrain petitioners' confrontational tactics and thereby limit the

> physical intimidation of, and resulting emotional trauma to, the clinic's patients. Added to the stress that normally accompanies any medical treatment, the strain of being pursued and harried by anti-abortion pickets and sidewalk "counselors," however well-meaning, could result in serious medical problems.

(App. 16a).

Hence, the court's concern was clearly not, as petitioners claim, emotional trauma alone, but the fact that such trauma was occurring immediately outside of a medical facility and thus presented potentially serious health and safety risks for those undergoing treatment and surgery inside the facility.

IV.

THE PLACE RESTRICTION DID NOT BURDEN MORE SPEECH THAN NECESSARY TO ACCOMPLISH ITS LEGITIMATE OBJECTIVES.

The place restriction in this case, like the 36-foot zone in *Madsen*, required the petitioners to move to the other side of the street and away from the sidewalk and driveways where the trial court found they had repeatedly impeded, confronted, and intimidated clinic patients. Petitioners characterize the decision as "nothing less than a rationale for excluding *all* pro-life speech from *all* public sidewalks or property." (Petition at 8). This tendentious characterization ignores the history of the case and the California Supreme Court's careful review to ensure that the injunction did not unnecessarily interfere with petitioners' speech rights.

At the preliminary injunction stage, the court had entered a

narrower restriction, allowing picketing on the sidewalk adjacent to the clinic, but limiting the number of pickets to four and requiring two of such picketers to maintain a ten-foot distance from the other two. (App. 4a). At trial, however, the court heard evidence that picketers on the sidewalk were violating the preliminary injunction, necessitating the presence of police to enforce its terms. (App. 4a, n.2). The court also heard testimony that petitioners were surrounding, following and harassing clinic patients on the sidewalk. (App. 4a-5a, 45a). On one occasion, the picketers surrounded a patient and attempted to force literature on her as she sat on the sidewalk curb; Planned Parenthood staff had to disperse the group. (App. 16a).

The trial court thus had before it undisputed evidence of conduct by the protesters that impeded and subjected a captive audience to abuse and intimidation as they attempted to secure access to medical care and counseling and thereby raised the risk of medical complications and injury. The court was faced with the task of crafting an injunction that preserved the interests in unfettered access to a medical facility and the health and safety of clinic patients as well as the protesters' rights to communicate their desired message, all in the context of a unique configuration of narrow sidewalk islands, interspersed with driveways. The court was also required to take into account the special problems posed by emotionally charged encounters between people in vehicles and on foot. Under these circumstances, in fashioning the place restriction so as to confine petitioners' picketing and related activities to the sidewalk opposite the clinic, the court did not burden more speech than necessary to preserve the identified interests.

After conducting a *de novo* review of the record, the California Supreme Court carefully considered the competing interests at stake and evaluated potentially less restrictive means of protecting the identified governmental interest; only then did it uphold the place restriction as narrowly tailored to effectuate the

health and safety interest under the unique circumstances of this case. In reaching this conclusion, the court was guided by this Court's statement in *Schaumburg v. Citizens For a Better Environment*, 444 U.S. 620, 637 (1980), that the means chosen to advance the interest must not "unnecessarily interfer[e] with First Amendment freedoms." (App. 17a).

The fact that the court did not *explicitly* determine that the restriction burdened no more speech than necessary does not undermine the validity of the decision. Nothing in the court's opinion or the record suggests that the restriction went beyond what was necessary to preserve the governmental interest in health and safety.[5] The appropriate scope of injunctive relief in cases such as this, as the court recognized, naturally depends on "the

5. The fact that the place restriction precluded all picketing and protest activity on the sidewalk fronting the clinic does not mean the restriction burdened more speech than necessary. The 36-foot zone upheld in *Madsen* likewise prohibited all such activity. (114 S. Ct. at 2526). Even under the new standard articulated in *Madsen*, therefore, the key issue remains not whether the restriction on speech is *intrinsically* narrow or limited in scope but whether it targets and eliminates no more than the exact source of the "evil" it seeks to remedy. *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 808-810 (1984). The Court in *Vincent* upheld a complete ban on all signs on public property based on the governmental interest in avoiding visual clutter and blight. It sustained the prohibition as narrowly tailored because "the substantive evil — visual blight — [was] not merely a possible by-product of the activity, [it was] created by the medium of expression itself." *Id.* at 810.

In this case, the "substantive evils" — harassment and intimidation of a captive audience and attendant health and safety risks — were created by the presence and activities of petitioners on the sidewalk. Here, as in *Vincent*, the medium of expression — the very presence and proximity of the picketers — created the evil sought to be remedied. The place restriction therefore targeted and eliminated no more than the exact source of the evil it sought to remedy. As the California Supreme Court stated, "the Constitution does not guarantee petitioners the right to create, in effect, a captive audience by cordoning off an area of the sidewalk and allowing no one to pass who did not agree to listen to their message." (App. 12a, n.6).

particular facts and geographic circumstances presented." (App. 19a). The particular facts and geography in this case included very narrow sidewalks surrounding the only driveway access to the clinic, such that even a few protesters could easily impede and harass anyone attempting to enter or leave the clinic property, whether by vehicle or on foot.[6] The court determined that the trial court, in crafting the injunction, "was guided by the paramount need to maintain an atmosphere around the clinic conducive to the health of the patients and its normal medical functions," and that confining the demonstrations to an alternative site across the street responded most effectively to this need. (App. 18a).

In reaching this conclusion, the court evaluated and rejected the potentially less-restrictive alternative of allowing a limited number of protesters on the sidewalk. This alternative, of course, had already been tried by the trial court at the preliminary injunction stage and had not worked to its satisfaction. Moreover, as the high court pointed out, merely restricting the number of protesters in front of the clinic would not necessarily mitigate the emotional impact — and consequent medical risk — on women "forced to navigate even a limited number of pickets and sidewalk 'counselors.' " (App. 20a). Nor, the court observed, would merely keeping the sidewalks free for passage "address the problem identified by the trial court of protesters hounding and upsetting unwilling listeners." *(Id.)*. The court concluded that:

> In these unique circumstances, the trial court was eminently justified in concluding that the protesters' proven confrontational tactics posed an intolerable threat to the emotional

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6. As the appellate court noted, the configuration of narrow sidewalks surrounding the clinic driveway was such that a handful of protestors could easily block pedestrian traffic on the sidewalk. (App. 55a). Moreover, witnesses testified that picketers would walk so slowly across the driveway leading to the clinic parking lot as to effectively impede or delay vehicles attempting to turn into the clinic parking lot. *(Id.)*.

> health and safety of the patients, whether those tactics were resorted to by two or twenty. . . . Substantial evidence from the hearing on the permanent injunction established that the state's interest in protecting the patients required the preclusion of face-to-face, physical confrontations with the protesters.

(App. 20-21a, n.10).

The court determined that the alternative site across the street from the clinic afforded petitioners a vantage point from which to picket and demonstrate that was reasonably close to the clinic and within plain view of their target audience. (App. 23a). It noted that "petitioners do not contend that their signs cannot be seen or that their presence and views cannot readily be perceived by persons entering or leaving the clinic." *(Id.)*.

The court's reasoning is fully consistent with the analysis in *Madsen*. There, this Court pointed out the limited options available to the trial court given the narrow confines around the clinic. (114 S. Ct. at 2527). There, as here, the "state court was convinced that allowing the petitioners to remain on the clinic's sidewalk and driveway was not a viable option in view of the failure of the first injunction" to accomplish its goals. *(Id.)*. The Court noted that the "failure of the first order to accomplish its purpose must be taken into consideration in evaluating the constitutionality of the broader order." *(Id.)*. The Court concluded that while the need for a complete buffer zone near the clinic entrances and driveway might be debatable, "some deference must be given to the state court's familiarity with the facts and the background of the dispute between the parties even under our heightened review." *(Id.)*. It held that "[o]n balance, . . . the 36-foot buffer zone around the clinic entrances and driveway burden[ed] no more speech than necessary to accomplish the governmental interest at stake." *(Id.)*. The same conclusion is warranted here.

V.

BECAUSE THE CALIFORNIA SUPREME COURT'S DECISION IS CONSISTENT WITH BOTH THE REASONING AND THE RESULT IN *MADSEN*, THERE IS NO BASIS FOR VACATING AND REMANDING THE DECISION FOR FURTHER CONSIDERATION IN LIGHT OF *MADSEN*.

The injunction imposed by the trial court and upheld by the California Supreme Court satisfies the standard articulated in *Madsen*. Accordingly, there is no need to remand for further consideration in light of *Madsen*. Given the facts and reasoning of this case, the state court should, and no doubt would, reach precisely the same result after remand.

The summary reversal and remand issued by this Court in *Reali v. Feminist Women's Health Center*, 114 S. Ct. 2776 (1994), has no bearing on a remand in this case. In *Reali*, the Court of Appeal justified the breadth of an injunction only in terms of a woman's *privacy right* to effectuate an abortion decision; the use of the free zone was upheld as "narrowly tailored to protect the patients' privacy interests." *Feminist Women's Health Center v. Blythe*, 17 Cal. App. 4th 1543, 1559-60 (1993). While the court explained that certain health and safety risks engendered by the protesters' activities justified the issuance of *an* injunction (*id.* at 1555), it did not analyze the breadth of the injunction as it related to the elimination of those risks. *Id.* at 1556-61. In light of *Madsen*, it was not sufficient for the court simply to identify health and safety concerns as a legitimate state interest to be protected; further consideration was required to determine whether the injunction burdened more speech than necessary to protect the identified interest. The California Supreme Court's decision in this case, however, contains no such defect.

CONCLUSION

The thrust of petitioners' argument is that because *Madsen* announced a heightened standard of scrutiny for injunctions limiting speech in a public forum, any injunction issued prior to *Madsen* will necessarily burden too much speech because the court will have applied the traditional time, place and manner standard. In fact, however, the outcome in each case will depend on the location, nature and impact of the protest activities, the breadth of the injunction and the governmental interest supporting the injunction. In light of the close similarities between the facts and reasoning in the two cases, this case is not one that warrants rethinking in light of *Madsen*. Respondent respectfully requests that the petition be denied.

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Respectfully submitted,

GEOFFREY L. ROBINSON
Counsel of Record
MARIA P. RIVERA
MCCUTCHEN, DOYLE, BROWN & ENERSEN
Attorneys for Respondent
1331 North California Blvd.
P.O. Box V
Walnut Creek, California 94596
(510) 937-8000